ATTACHMENT E

AMERICAN CIVIL LIBERTIES UNION of NEVADA

To: **Board of Prison Commissioners**
From: **ACLU of Nevada**
Date: **July 13, 2010**
Re: **Comments on Proposed Administrative Regulations 120, 432, 460, 705.**

Dear Governor Gibbons, Attorney General Masto, and Secretary Miller,

Below please find the ACLU of Nevada's written testimony expressing concerns over proposed regulations AR 120, AR 432, AR 460, and AR 705. If you have any concerns or questions about this testimony, please do not hesitate to contact me. Thank you very much for your time and attention to these important matters of constitutional import.

Sincerely,

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AR 120 (Concerning news media):

The ACLU of Nevada has several concerns about AR 120, which we believe could operate to keep large swaths of public information inappropriately confidential and violates Nevada's Public Records Law. As a general rule, Nevada Revised Statute 239 requires that NDOC make all public documents available to the public – including news media – and that all documents created by a public entity are presumptively public unless they fall into one of the law's specific exceptions. NRS 239.010(1). We believe that AR 120 defines new categories of "confidential" information that are far broader than the categories allowed by state law, and are thus concerned that the proposed regulation inappropriately contradicts state law.

In defining "public information" for the purposes of NDOC, section 120.06.3 of AR 120, "Response for Requests for Public Information," prohibits the disclosure of "specifics of institutional misconduct," as well as "any information" not explicitly listed as public, and "the location or acknowledgement of the presence of an inmate" housed

under the Interstate Corrections Compact. While we understand that ongoing criminal investigations, victim information (*see, generally,* NRS 209), and employee performance evaluations are generally exempt from Nevada's public records laws, to the extent that any other information not declared statutorily confidential appears in NDOC public documents, it must be disclosed under state law. In particular, NDOC's language prohibiting disclosure of institutional misconduct creates a perverse ability to hide information of public policy failures from the public. This is unacceptable unless such data also contains information which is confidential under state law – and even so, NRS 239 requires redaction wherever possible to ensure the broadest possible public oversight of government agencies.

Further, the complete blackout of information about Interstate Corrections Compact (ICC) inmates is bewildering and extremely troubling. The Nevada Revised Statutes devote a significant section of legislation to the ICC and its procedures and policies (NRS 215A). Nowhere in NRS 215A does the law indicate any secrecy or confidentiality; to the contrary, the law requires equal treatment of Nevada inmates and ICC inmates. We do understand that certain ICC inmates may be in Nevada for protective custody or other sensitive reasons; however, any regulation intending to protect such data must be tailored to that concern. This regulation amounts to a total information blackout about out-of-state inmates, including their existence, fiscal impact, and location. We believe this is improper under the First Amendment and Nevada law.

Finally, we are also concerned that section 120.03.C requires makers of documentaries and writers of non-fiction books to supply a list of major financial contributors. If decisions about access by media to particular inmates are denied based on funding sources, this requirement could needlessly open NDOC up to litigation over inappropriate discrimination under the First Amendment.

AR 432 (Transportation of Inmates for Medical Treatment):

This regulation states that "[a]t no time will any restraints be removed from the inmate unless prior approval is obtained from the Officer's supervisor," and provides that custody staff may veto any medical request to unshackle an inmate. The ACLU of Nevada strongly urges that NDOC consider explicitly limiting the use of restraints on pregnant women to circumstances where the woman is a danger to herself or others or a flight risk, such risks are affirmatively documented prior to the restraint, and all restraints are removed at the request of medical staff. Courts and state legislatures are increasingly finding that use of restraints on pregnant inmates is inappropriate and unacceptable in all but the most extreme circumstances. Thus, correctional authorities that fail to implement policies that adequately prohibit or restrict the use of restraints on pregnant inmates risk violation of the Eighth Amendment of the United States Constitution, state constitutional provisions, and state laws. *See, e.g., Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009); *Women Prisoners of the District of Columbia v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996); CAL. PENAL CODE § 5007.7 (West 2008); CAL. PENAL CODE § 3423 (West 2008); 55 ILL. COMP. STAT. ANN. 5/3-15003.6 (West 2008); 730 ILL. COMP. STAT. ANN. 125/17.5 (West 2008); 28 V.S.A. § 801a (West 2008);

N.M.STAT. ANN. § 33-1-4.2 (West 2009); TEX. GOV'T CODE ANN. § 501.066 (Vernon 2009); TEX. HUM. RES. CODE ANN. § 61.07611 (Vernon 2009); TEX. LOC. GOV'T CODE ANN. § 361.082 (Vernon 2009); N.Y. CORRECT. LAW § 611 (McKinney 2009).

Moreover, in addition to the laws now being adopted across the country, the Federal Bureau of Prisons, the U.S. Marshal Service, and the American Correctional Association have all adopted policies to limit the use of shackles on pregnant women prisoners. *See* Fed. Bureau of Prisons, Program Statement: Escorted Trips, No.5538.05 at § 570.45 (Oct. 6, 2008), *available at* http://www.bop.gov/policy/progstat/5538_005.pdf; U.S. Marshal Serv., Policy 9.1 (Restraining Devices) §§ (D)(3)(e), (h) (as amended in 2008); *ACA File No. 2008-023*, STANDARDS COMM. MEETINGS MINUTES, ACA 138TH CONG. OF CORR. (Am. Corr. Ass'n, New Orleans, La.) Aug. 8, 2008 at 62, *available at* http://www.aca.org/standards/pdfs/Standards_Committee_Meeting_August_2008.pdf. We urge NDOC to add language to AR432 reflecting the consensus that pregnant women in labor can be shackled only in the most extreme, and documented, circumstances.

AR 460 (Security at Community Hospitals):

This regulation states that all outgoing mail is completely prohibited for inmates while at a non-NDOC medical facility. We have very serious concerns that this regulation is not narrowly tailored for security purposes, especially given that incoming mail is still, appropriately, permitted. Of most concern, this regulation bars all mail including mail to an inmate's lawyer or religious mentor, both of whom may be extremely important when an inmate is in a critical medical situation. We have concerns that this regulation unconstitutionally limits inmates' First Amendment rights, especially regarding legal or religious mail.

AR 705 - Inmate Grooming and Personal Hygiene:

This regulation allows for facial hair that is "kept clean and neat, subject to provisions in this regulation" but does not provide a religious exception for length. AR 810, which deals with religious faith groups, mentions religious diets as potentially protected activity, but nowhere mentions hair length or grooming. Yet, the need to wear facial and head hair in certain manners is the focus of many religious mandates, from Native American practices to Orthodox Judaism. Due to the high likelihood that NDOC will receive requests for religious accommodations to its grooming policy as set out in AR 705, we suggest specific language indicating that exemptions may be made for religious reasons. The Ninth Circuit has held that inmates have a right to religious exemptions from prison grooming policies under the First Amendment and RLUIPA. *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005). Including appropriate language so that NDOC employees applying the ARs recognize the constitutional need for such religious accommodation will avoid unnecessary liability under settled law.